

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

PHILLIP DIONTE BOLER,

Petitioner,

v.

**WARDEN, MARION
CORRECTIONAL INSTITUTION,**

Respondent.

CASE NO. 2:19-CV-4321

JUDGE JAMES L. GRAHAM

Chief Magistrate Judge Elizabeth P. Deavers

OPINION AND ORDER

On September 30, 2019, the Magistrate Judge issued a Report and Recommendation pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts recommending that this action be dismissed as barred by the one-year statute of limitations under 28 U.S.C. § 2244(d). (ECF No. 7.) Petitioner has filed an Objection and Amended Objection to the Magistrate Judge's Report and Recommendation. (ECF Nos. 8, 9.) Pursuant to 28 U.S.C. § 636(b), this Court has conducted a de novo review. For the reasons that follow, Petitioner's objections (ECF Nos. 8, 9) are **OVERRULED**. The Report and Recommendation (ECF No. 7) is **ADOPTED** and **AFFIRMED**. This action is hereby **DISMISSED**.

The Court **DECLINES** to issue a certificate of appealability.

Petitioner objects to the dismissal of this action as time-barred. Referring to his Affidavit of Facts with Memorandum in Support (ECF No. 3), Petitioner asserts that his actual innocence justifies equitable tolling of the statute of limitations. According to Petitioner, he is actually innocent because the evidence is constitutionally insufficient to sustain his convictions and the State improperly amended the charges against him. Petitioner further argues that he was denied

adequate notice of the charges against him and convicted on the basis of improper jury instructions.

The one-year statute of limitations may be equitably tolled upon a “credible showing of actual innocence.” *See Cook v. Ohio*, No. 2:15-cv-02669, 2016 WL 374461, at *10 (S.D. Ohio Feb. 1, 2016) (citing *Souter v. James*, 395 F.3d 577, 602 (6th Cir. 2005)). Accordingly, “a petitioner whose claim is otherwise time-barred may have the claim heard on the merits if he can demonstrate through new, reliable evidence not available at trial, that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.” *Yates v. Kelly*, No. 1:11-cv-1271, 2012 WL 487991, at *1 (N.D. Ohio Feb. 14, 2012) (citing *Souter*, 395 F.3d at 590). Actual innocence means factual innocence, not mere legal sufficiency. *See Bousely v. United States*, 523 U.S. 614, 623 (1998). However, the Petitioner must overcome a high hurdle in order to establish his actual innocence.

The United States Supreme Court has held that if a habeas petitioner “presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.” *Schlup*, 513 U.S. at 316, 115 S. Ct. 851, 130 L.Ed. 2d 808. Thus, the threshold inquiry is whether “new facts raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial.” *Id.* at 317, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808 “To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.” *Schlup*, 513 U.S. at 324, 115 S. Ct. 851, 130 L.Ed.2d 808. The Court counseled however, that the actual innocence exception should “remain rare” and “only be applied in the ‘extraordinary case.’” *Id.* at 321, 513 U.S. 298, 115 S. Ct. 851, 130 L.Ed.2d 808.

Souter, at 589-90 (footnote omitted). “To invoke the miscarriage of justice exception to AEDPA's statute of limitations . . . a petitioner ‘must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.’” *McQuiggin v.*

Perkins, 569 U.S. 383, 399 (2013) (quoting *Schlup*, 513 U.S. at 327). Petitioner has failed to meet this burden here. He has provided no new reliable evidence supporting his claim of actual innocence. The record does not indicate that Petitioner is entitled to equitable tolling of the statute of limitations on this basis.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court now considers whether to issue a certificate of appealability. “In contrast to an ordinary civil litigant, a state prisoner who seeks a writ of habeas corpus in federal court holds no automatic right to appeal from an adverse decision by a district court.” *Jordan v. Fisher*, 135 S. Ct. 2647, 2650 (2015); 28 U.S.C. 2253(c)(1) (requiring a habeas petitioner to obtain a certificate of appealability in order to appeal). The petitioner must establish the substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). This standard is a codification of *Barefoot v. Estelle*, 463 U.S. 880 (1983). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (recognizing codification of *Barefoot* in 28 U.S.C. § 2253(c)(2)). To make a substantial showing of the denial of a constitutional right, a petitioner must show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” *Slack*, 529 U.S. at 484 (quoting *Barefoot*, 463 U.S., at 893 n. 4).

Where the Court dismisses a claim on procedural grounds, however, a certificate of appealability “should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Id.* Thus, there are two components to determining whether a certificate of appealability

should issue when a claim is dismissed on procedural grounds: “one directed at the underlying constitutional claims and one directed at the district court's procedural holding.” *Id.* at 485. The court may first “resolve the issue whose answer is more apparent from the record and arguments.” *Id.*

This Court is not persuaded that reasonable jurists would debate the dismissal of this action as time-barred. Therefore, the Court **DECLINES** to issue a certificate of appealability.

The Court certifies that the appeal would not be in good faith and that an application to proceed *in forma pauperis* on appeal should be **DENIED**.

The Clerk is **DIRECTED** to enter **FINAL JUDGMENT**.

IT IS SO ORDERED.

Date: October 16, 2019

s/James L. Graham
JAMES L. GRAHAM
UNITED STATES DISTRICT JUDGE